affirming the award of the Commission. (A. 1). This Joint Petition for Writ of Certiorari, to which this Brief is filed in opposition, followed.

II.

Charles H. Sutherland v. Clinchfield Coal Co.

In 1967, petitioner Charles H. Sutherland applied for employment with Clinchfield Coal Company. As part of the pre-employment medical examination given to all prospective employees, an x-ray film was taken of Southerland's chest and sent to Dr. W. C. Elliott for interpretation. In accordance with findings made by Dr. Elliott that Sutherland's history of physical examination revealed "fibro-nodose infiltration of lungs" and that he was affected by or susceptible to silicosis (A. ....), Clinchfield secured a written waiver from Sutherland. This waiver, on a form supplied by the Industrial Commission of Virginia, provided that Sutherland was waiving "the right to claim compensation benefits covering the following physical conditions: fibro-nodose infiltration of lungs consistent with early silicosis." The waiver was approved by the Industrial Commission on September 27, 1967. (A. 22).

On August 27, 1973, Sutherland filed an Application for Hearing with the Industrial Commission alleging that he was suffering the occupational disease of coal workers' pneumoconiosis which he alleged that he contracted as a result of exposure to the causative hazards of the disease during his employment with Clinchfield. The Application was presented to the Industrial Commission on December 13, 1973 and was defended by Clinchfield on the ground that the waiver executed by him in 1967 and approved by the Industrial Commission barred his claim for benefits. Sutherland conceded at the hearing that while he did not remember signing the waiver, he might have done so. (A. 27).

By opinion dated January 8, 1974, Commissioner Evans held that the waiver executed by Sutherland in 1967 effectively barred the claim. (A. 22-23). The claim was thereafter reviewed by the full Commission and by opinion dated March 19, 1974, the Commission adopted the findings of fact and conclusions of law in Commissioner Evans' decision and affirmed the award. (A. 32). Sutherland then petitioned the Supreme Court of Virginia for an appeal of the Commission's decision, but by opinion dated June 25, 1974, that Court held that there was no reversible error in the award appealed from and rejected the Petition. (A. 2). The Petition for Writ of Certiorari to the Supreme Court of Virginia followed.

III.

James E. Dye v. Jewell Ridge Coal Corp.

In 1965, James E. Dye, who had previously been employed as an underground coal miner, applied for a position as a miner with Jewell Ridge Coal Corp. (A. 66-67). As part of the pre-employment medical examination required of all potential employees, an x-ray was taken of Dye's chest. Pursuant to findings made as a result of an examination of the film, Dye executed a waiver providing that he was waiving "the right to claim compensation benefits covering the following physical conditions: silicosis or any aggravation thereof." This waiver, which was executed pursuant to *Va. Code Ann.* § 65.1-53 [formerly § 65-50], was approved by the Industrial Commission on March 17, 1965. (A. 18).

On November 17, 1972, claimant filed an Application for hearing with the Industrial Commission alleging that he had sustained the occupational disease of coal workers' pneumoconiosis to which he was last injuriously exposed while employed by Jewell Ridge Coal Corp. The claim proceeded to hearing before the Industrial Commission in

Grundy, Virginia on October 31, 1973. In addition to other defenses raised at the hearing, Jewell Ridge defended the claim on the ground that the waiver which Dye executed on January 5, 1965 barred the claim for the occupational disease alleged. Dye contended that since the waiver specifically named silicosis as the occupational disease waived, it did not apply to his claim for coal workers pneumoconiosis. However, Commissioner Evans rejected this argument, stating:

> "Pneumoconiosis is the generic term applied to pathological changes occurring in the lungs as a result of the inhalation of harmful dust. If the causative hazard is silica the resulting condition is diagnosed as silicosis. If the causative hazard is coal dust the same pathological condition would be diagnosed as coal workers' penumoconiosis. All coal miners are exposed to the inhalation of both silica and coal dust and silica is also one of the components in coal dust. It is medically impossible to determine from x-ray evidence whether the pathological changes in the lungs are due to the inhalation of coal dust or silica dust or a combination of the two. The only positive diagnosis that can be made is that of pneumoconiosis when the x-ray findings disclose nodulation of the lung tissue. A more specific diagnosis must be predicated on the history of the type of dust to which the employee was exposed. (A. 25).

At the hearing, Dye admitted that he had signed the waiver, although he conceded that he had not read it before signing it. (A. 64, 67). Dye further conceded that his exposure to rock dust and coal dust was the same prior to his employment with Jewell Ridge as it was after the time he was employed and that it was important for him to get a job with Jewell Ridge because of higher wages and better working conditions. (A. 67).

Commissioner Evans upheld the defense based upon the

effectiveness of the waiver and dismissed the claim. (A. 24-25). Dye then applied for a review of Commissioner Evans' decision before the full Commission and by opinion dated March 19, 1974, the full Commission adopted the findings of facts and conclusions of law contained in Commissioner Evans' award of January 7, 1974 and affirmed that decision. (A. ....). Following the full Commission's affirmance of the earlier award dismissing the claim, Dye petitioned the Supreme Court of Virginia for an appeal. By Order entered June 25, 1974, the Supreme Court of Virginia rejected the appeal and affirmed the award of the Industrial Commission. (A. 3). The Petition to which this Brief is filed in response followed.

IV.

Clownie T. Meadows v. Clinchfield Coal Co.

Meadows began work for Clinchfield Coal Company as a general inside laborer in December, 1958 and continued to work in that employment until August, 1963. (A. 93). He then applied for another job as foreman with Clinchfield in September, 1965. Prior to being hired on the second occasion, Meadows underwent a complete physical examination including his chest. This chest x-ray film was interpreted by Dr. W. C. Elliott who expressed the opinion that Meadows had fibrosis of the lungs which "is consistent with early silicosis, or makes this man more susceptible to the disease of silicosis." (A. 27). In accordance with Dr. Elliott's findings and pursuant to *Va. Code Ann.* § 65.1-53, Meadows executed a written waiver whereby he agreed to waive "the right to claim compensation benefits covering the following physical conditions: fibro-nodose infiltration of the lungs consistent with early silicosis." This waiver

was approved by the Industrial Commission on January 13, 1967. (A. 26-27).

On June 1, 1973, Meadows filed an Application for Hearing with the Industrial Commission alleging that he was suffering the occupational disease of coal workers' pneumoconiosis to which he was last injuriously exposed while employed by Clinchfield. The claim proceeded to hearing before the Industrial Commission on December 12, 1973 and was defended by Clinchfield on the ground that the waiver previously executed by Meadows in 1965 barred his claim. Commissioner Evans upheld the defense and dismissed the claim. Meadows then applied for a review of Commissioner Evans' decision before the full Commission and by opinion dated March 18, 1974, the full Commission adopted the findings of fact and conclusions of law contained in the decision of Commissioner Evans and affirmed that award. (A. 33). Meadows petitioned the Supreme Court of Virginia for an appeal of the Industrial Commission's award, and by Order entered on June 25, 1974, the Court rejected the Petition and affirmed the award of the Industrial Commission. (A. ....).

V.

Clyde Ruel Dye v. Jewell Ridge Coal Corp.

In 1969, Clyde Ruel Dye who had been previously employed as an underground coal miner, applied for employment with Jewell Ridge Coal Corp. A routine pre-employment chest x-ray film was taken of Dye and was interpreted by Dr. W. C. Elliott as revealing "fibro-nodose infiltration of the lungs." It was Dr. Elliott's opinion, based on Dye's work history and his own physical examination, that Dye was affected by or susceptible to silicosis and/or coal workers' pneumoconiosis. In accordance with Dr. Elliott's find-

ings, Dye executed a written waiver on August 11, 1969 which provided that he was waiving "the right to claim compensation benefits covering the following physical conditions: fibro-nodose infiltration of lungs consistent with early silicosis and/or coal workers' pneumoconiosis." This waiver was signed by Dye, witnessed by a representative of Jewell Ridge Coal Corp., and approved by the Industrial Commission on December 7, 1971. (See opinion of Commissioner M. E. Evans of the Industrial Commission of Virginia, dated October 24, 1973).

On July 19, 1972, Dye filed an Application for Hearing with the Industrial Commission of Virginia seeking to recover workmen's compensation benefits on account of the occupational disease of coal workers' pneumoconiosis. A hearing was held by the Industrial Commission in Lebanon, Virginia on September 18, 1974 and was defended by Jewell Ridge on the ground that the waiver executed by Dye in 1969 barred his claim. Dye admitted at the hearing that he had signed the waiver but denied that he knew what he was signing. Dye made no assertion that the waiver was obtained by Jewell Ridge through fraud, coercion or duress. Commissioner Evans dismissed the claim in an opinion filed on October 24, 1973, holding that the waiver executed by Dye, in fact, bar his claim for workmen's compensation benefits. His opinion was affirmed by the full Commission on December 18, 1973. Dye thereafter petitioned the Supreme Court of Virginia for an appeal of the Industrial Commission's decision and on June 25, 1974, the Supreme Court held that there was no reversible error in the award appealed from, rejected the Petition, and affirmed the award of the Industrial Commission. (A. 4).

VI.

Hazelton McReynolds v. Clinchfield Coal Co.

Hazelton McReynolds, an employee of the respondent, Clinchfield Coal Company, was first employed by Clinchfield in 1967. Immediately preceding that employment, McReynolds submitted to a physical examination which included the taking of a chest x-ray film. This film was reviewed by Dr. W. C. Elliott, and he filed a certificate expressing the opinion that McReynolds was "affected or is susceptible to silicosis since history and physical examination indicates: fibro-nodose infiltration of lungs." (A. 19). In accordance with Dr. Elliott's findings and pursuant to *Va. Code Ann.* § 65.1-53, McReynolds executed a waiver which stated that he was waiving "the right to claim compensation benefits covering the following physical conditions: fibro-nodose infiltration of lungs consistent with early silicosis." The execution of the waiver was witnessed by a representative of Clinchfield Coal Company and was approved by the Industrial Commission on April 14, 1967. (A. 19).

On October 19, 1973, McReynolds filed an Application for Hearing with the Industrial Commission alleging that he was suffering the occupational disease of coal workers' pneumoconiosis to which he was last injuriously exposed with Clinchfield. This Application was heard before Comissioner Evans of the Industrial Commission of Virginia in Lebanon, Virginia, on December 13, 1973. At the hearing, McReynolds testified that he did sign the waiver in 1967. (A. 106). Although McReynolds denied that he knew the purpose of the waiver, he admitted that he did not read it before executing it. (A. 107, 108).

Clinchfield defended the claim on the ground that the waiver executed by McReynolds in 1967 barred his claim

for benefits for occupational disease. Commissioner Evans held that the waiver did constitute a valid and effective bar to the claim presented and dismissed it. The full Commission affirmed Commissioner Evans' award on April 17, 1974. Thereafter, McReynolds petitioned the Supreme Court of Virginia for an appeal of the Industrial Commission's decision and by opinion dated June 27, 1974, the Supreme Court of Virginia, after maturely considering the Petition, found that there was no reversible error in the award appealed from and refused the appeal. (A. 5).

SUMMARY OF ARGUMENT

The legal issues sought to be reviewed deal primarily with the interpretation of a state statute and its specific application to the petitioners. The same issues now before this Court in these petitions were raised in *Williams* v. *Clinchfield Coal Co.*, 213 Va. 445, 192 S.E.2d 751 (1972), *cert. den.*, 412 U.S. 932 (1973) and were adequately disposed of in that case. In order to properly resolve the question in issue, it is not necessary to reach the constitutional issues asserted. The petitioners have made no showing of special and important reasons for granting a writ of certiorari.

Since the petitioners were not being deprived of existing rights and no existing benefits were being terminated at the time they executed the waivers, they were not entitled to a full evidentiary hearing prior to the execution of those waivers. Furthermore, the record fully supports the findings of the Industrial Commission of Virginia that each of the petitioners did receive a evidentiary hearing prior to a judicial determination that they were not entitled to the workmen's compensation benefits sought.

Each of the petitioners were employed after the execu-

tion of the waivers; consequently, none has standing to argue that they had a constitutional right to be employed.

Since the statute in question by its explicit terms applies only to those persons who have been medically determined to be affected by or susceptible to a specific occupational disease and permits only those persons to waive benefits for an aggravation of that condition which results from their working or continuing to work in the same employment, the statute is not constitutionally infirm for reasons of vagueness and meets the criteria of giving notice against those to whom it is directed.

A legitimate state interest in the enactment of the statute under attack, *Va. Code Ann.* § 65.1-53, has been clearly shown. The purpose of the statute is to permit both the conditional employment of persons affected by or susceptible to an occupational disease and to provide protection to those employers who are willing to employ such persons. The petitioners have made no showing of arbitrary or unreasonable state action in the passage of this statute or in its enforcement against them.

ARGUMENT

A.

There Are No Federal Questions Of National Importance Involved Here And No Special And Compelling Reasons For This Court To Review This Case.

The petitioners strongly urge this Court to review the opinions of the administrative agency charged with enforcing the Virginia Workmen's Compensation Act and the decision of the highest Court of that state on the ground that there are federal questions of national importance involved here. In truth, however, the real issue before that agency and the Supreme Court of Virginia was the

construction of a state statute and its direct application to the petitioners. As is seen by the record below, the constitutional issues raised were of only secondary importance to the petitioners, the Industrial Commission of Virginia, and Supreme Court of Virginia. Both the non-constitutional and constitutional issues were fully answered by that Court in *Williams* v. *Clinchfield Coal Co.*, 213 Va. 445, 192 S.E.2d 751 (1972); *cert. den.*, 412 U.S. 932 (1973). Although the factual situations in each of these cases is different, there are no unusual or peculiar facts in these cases to warrant a decision different from that rendered in *Williams* v. *Clinchfield Coal Co., supra.*

The primary issues below were two-fold: first, whether the waivers executed by the petitioners prior to their employment with Clinchfield Coal Co. or Jewell Ridge Coal Corp. encompassed the occupational disease for which they sought workman's compensation benefits; and, secondly, whether the waivers were properly executed and approved. The first of those issues was essentially a medical issue, and the evidence before the Commission and the Supreme Court of Virginia was more than sufficient to show that the waivers executed by the petitioners barred their claim for workmen's compensation benefits under *Va. Code Ann.* § 65.1-53. The second of those issues was factual, and the Industrial Commission of Virginia was the state administrative body charged with making findings of fact. Those findings are conclusive and binding in the absence of fraud, and must be accepted even if made upon conflicting evidence or if made upon substantial evidence deemed to be credible by the Industrial Commission. See *Va. Code Ann.* § 65.1-98; see also *Ward & Gow* v. *Krinsky*, 259 U.S. 503 (1922). The petitioners impliedly concede that there has been no showing of fraud, duress or coercion on the part of the employers in these cases.

In an obvious effort to inject substantial federal questions into this case, the petitioners mention the existence of a Federal Coal Mine Health and Safety Act, the cost of that program, its effect on state workmen's compensation laws, and allegations regarding similar cases pending in courts below. (Petition, p. 14-16). It is submitted that the mention of those matters is merely a smoke screen to divert this Court's attention from the real issue at stake. Those matters were neither made a part of the record of these cases nor considered by the Court below and are not appropriate for consideration at this stage of the proceedings.

A reading of the record and the opinion of both the Industrial Commission and the Supreme Court of Virginia plainly demonstrates that adequate and independent grounds, based solely on state law, existed for the resolution of the issues in this controversy and that the constitutional questions were subordinate and unnecessary for the proper adjudication of those issues. To review this case would be to contravene a long-standing and traditional practice of this Court of not deciding constitutional questions when the record discloses other grounds for decision which are both adequate and necessary to the disposition of that case. See *Neese* v. *Southern Ry.*, 350 U.S. 77 (1955).

We do not deny the right of litigants such as the petitioners to petition this Court for a review of a state workmen's compensation law. This, however, does not change the fact that the petitioners' attack on *Va. Code Ann.* § 65.1-53 is seemingly based on the wisdom of its enactment rather than its alleged constitutional infirmities. However, this Court has made clear that it will decline to enter into a discussion of the wisdom of legislation. See *Communist Party of the U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

B.

The Petitioners Have Made No Showing That They Were Deprived Of The Right To Be Employed Because Of Arbitrary State Interference In The Enactment Of Va. Code Ann. § 65.1-53.

The petitioners complain that the enactment of *Va. Code Ann.* § 65.1-53 constituted arbitrary state interference with their right to work with Clinchfield Coal Co. and/or Jewell Ridge Coal Corp. The short answer to this allegation is that there is simply no evidence in the record before this Court to indicate that the signing of the waivers prevented any of them from the right to be employed. To the contrary, each of them was employed and it could be forcefully argued that it was only because of the existence of the "waiver" statute and the execution of the waivers by each of the petitioners that they were able to obtain such employment.

Even if it be assumed that the enactment of the Virginia "waiver" statute was actually arbitrary state interference, petitioners' argument that such a right to work is constitutionally protected is totally without merit.

The cases cited by the petitioners in support of their novel proposition, such as *Greene* v. *McElroy,* 360 U.S. 474 (1959), are inapplicable. Those cases deal with the right of an employer to terminate an existing employment relationship and not the right, as is asserted here, of a prospective employee to hold such employment. This Court has never held that employment at a particular job is a constitutionally protected right. Cf. *San Antonio Indep. School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973). The only constitutional right conceivably involved is the right to obtain or hold employment free from discriminatory practice aimed at race, religion and the like, and these petitioners do not claim such discrimination. See *Truax* v. *Raich,* 239 U.S.

33 (1915); see also *Slochower* v. *Board of Education*, 350 U.S. 551 (1956) (no constitutional right to public employment); *Konigsberg* v. *State Bar of Calif.*, 366 U.S. 36 (1960) (no constitutional right to be admitted to practice law in a particular state).

C.

The Petitioners Were Not Constitutionally Entitled To A Full Evidentiary Hearing Prior To The Execution Of The Waivers; Furthermore, Petitioners Were Granted A Full Evidentiary Hearing Before It Was Determined That They Were Not Entitled To State Workmen's Compensation Benefits.

The petitioners contend that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution entitles them to a full adjudicatory hearing as to the effectiveness of the waivers prior to their execution of those waivers. This issue was raised and fully answered in *Williams* v. *Clinchfield Coal Co.*, *supra*, 192 S.E.2d at 752.

The critical distinction between the cases now before this Court and the rights involved in *Goldberg* v. *Kelly*, 397 U.S. 254 (1969), and *Bell* v. *Burson*, 402 U.S. 535 (1971), upon which the petitioners place great reliance, is that those cases dealt with the termination of existing rights, whereas there are no such "existing rights" in the present cases. For example, the issue in *Goldberg* was whether procedural due process required that welfare recipients be afforded an evidentiary hearing prior to the termination of those benefits. In contrast, no rights or benefits were terminated in the present cases when the waivers were signed because none existed at that time. In fact, at the time these waivers were executed none of the petitioners had a right to make a claim for compensation benefits on account of occupational diseases, and it was not until they filed for hearing with the Industrial Commission

of Virginia some three or four years later, after the diagnosis of an occupational disease had been communicated to them, that they had such a right to make a claim. See *Va. Code Ann.* § 65.1-49. As this Court recently pointed out in *Bd. of Regents* v. *Roth*, 408 U.S. 564, 576 (1972), "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person *has already acquired* in specific benefits" (Emphasis added). To have a property interest in a benefit, the Court continued,

> "[A] person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it. He must, instead, have a legal claim of entitlement to it." 408 U.S. at 577.

These petitioners either ignore or overlook the fact that in their specific cases no determination of any kind as to the validity of the waivers or their right to receive workmen's compensation benefits was made until *after* a full-scale evidentiary hearing was held before the Industrial Commission of Virginia (A. 36-45, 46-50, 54-72, 90-95, 106-112). At that time, each of the petitioners was represented by counsel who was retained for them by United Mine Workers of America, testified on their own behalf, and had the opportunity to cross-examine the employer's witnesses. They also had the opportunity to submit evidence in support of their claim and to test the validity of the waivers. This hearing clearly satisfied the constitutional requirement that a full hearing must be held at *some* stage of the proceedings. See *Ewing* v. *Mytinger and Casselberry*, 339 U.S. 594 (1950).[2]

---

[2] Rule 1 of the Rules of the Industrial Commission of Virginia, promulgated pursuant to *Va. Code Ann.* § 65.1-18 provides as follows:

"A hearing held by the full Commission, a Commissioner, or

Although the petitioners direct this Court's attention to the recent decision of *Dillard* v. *Industrial Commission of Va.*, ... U.S. ..... (42 U.S.L.W. 4729) (1974), a careful reading of that decision indicates that it is entirely inapposite to the situation presented here. That case dealt with the question of whether a Virginia statute which permits the suspension of a claimant's workmen's compensation benefits pending a full administrative hearing on the merits of his claim meets the requirements of the Due Process Clause of the Fourteenth Amendment. But in this case, as we have pointed out above, a full-scale hearing was held before any determination was made as to the suspension or deprivation of workmen's compensation benefits. Petitioners also overlook the fact that the end result in *Dillard, supra*, was that the case was remanded to the lower court for reconsideration of the question of whether Virginia law also permits a claimant whose workmen's compen-

---

Deputy Commissioner shall be conducted as a judicial proceeding in that all witnesses shall testify under oath, and a record of the proceedings shall be made and kept. The Commission will not be bound by statutory or common law rules of pleadinng or evidence, nor by any technical rules of practice in conducting hearings, but will conduct such hearings and make such investigations in reference to the questions at issue in such manner as in its judgment are held adapted to ascertain and determine expeditiously and accurately the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation Act; and to end, hearsay evidence may be received.

The party requesting a hearing or requesting a review shall have the right to open and close, and, upon review, the parties shall be allotted twenty minutes to a side in which to present oral argument.

Subpoenas requested by the parties will be issued by the Commission and sent to the party requesting the same to be by him turned over to the proper officer for execution. The party requesting the subpoena shall be primarily liable for the officer's fee for serving the same.

[Final paragraph omitted]"

sation benefits have been suspended to have them reinstated by a state trial court pending a full administrative hearing on the merits.

The petitioners further contend that there were specific material circumstances in each of the cases which would have required the Industrial Commission of Virginia to deny approval of the waivers had these material circumstances been known at the time the waivers were executed. For example, the petitioners assert that there is some question as to whether they freely and knowingly executed the waivers, whether there was an accurate identification of the persons who did execute the waivers, and whether the medical evidence was sufficient to support their execution. However, this totally ignores the undisputed fact that those precise questions were before the Industrial Commission when the validity and effectiveness of the waivers were brought into issue and *before* the Industrial Commission made any decision as to their validity. As pointed out above, each of the petitioners testified and had the opportunity to present evidence in support of their claim that the waivers were invalid. At the same time, the Commission had the opportunity to judge the credibility and demeanor of the witnesses, to compare the signatures on the waivers with the signatures of the petitioners, and to make an accurate judgment as to the sufficiency of the medical evidence. These were questions of fact which the Commission alone had the power to resolve. These findings of fact, made by the body peculiarly charged with making such findings, are conclusive and binding unless determined to be wholly without support, including any reasonable inference that may be drawn from them. See *Ward and Gow* v. *Krinsky*, 259 U.S. 503 (1922). Under no circumstances can it be argued that the findings of fact made by the Industrial Commission were wholly without support.

In a final effort to persuade this Court to declare the waivers invalid, the petitioners attack the credibility and expertise of the physician whose medical opinion formed the basis of these waivers. However, this attack has been fully answered by the Industrial Commission below:

> "It should be further noted that although the cited 1949 case of *Keith* v. *Clinchfield Coal Corp.*, 189 Va. 592 [54 S.E.2d 126] (which involved the issue of negligence and not a waiver to susceptibility to silicosis, etc.), comments that Dr. W. C. Elliott, the head of the hospital at Lebanon, Virginia, then was without experience in the disease of silicosis at the time of the 1943 x-rays therein involved, it provides no authority or evidentiary basis for the waiver case now at bar, some twenty-five years later. There is no evidence in the instant case that Dr. Elliott, a licensed medical doctor, was not in 1969 fully qualified to evaluate and render his certification, upon which the signed waiver and its approval were based. Moreover, the evidence herein does not show that during the intervening quarter century Dr. Elliott has not attained experience and competence in this area of medicine, which reasonably would be expected and presumed of such physician in similar circumstances practicing with miners in an area where the diseases of silicosis and coal miners' pneumoconiosis during the period have been the foremost subject of medical attention and study." (A. 30-31).

D.

The Statute In Question Is Not Constitutionally Infirm As Being Void For Vagueness.

The petitioners' contention that the Virginia waiver statute is unconstitutionally vague was rejected in *Clinchfield Coal Co., supra*, 192 S.E.2d at 752, and it is submitted that this Court should follow the reasoning in *Williams*.

The primary basis for that argument was the Industrial Commission of Virginia's holding that the petitioners' claim for compensation benefits on account of the occupational disease of coal workers' pneumoconiosis was barred because they were found to be susceptible to or affected by the occupational disease of silicosis at the time they executed their waivers. It is apparent on its face that this argument pertains simply to the interpretation of the statute rather than the actual wording of the statue.

Furthermore, *Va. Code Ann.* § 65.1-53 illustrates that it is precise and clear in its terms and in no way can be read to support petitioners' assertions. It does not provide, as petitioners maintain, that if a person is found to be susceptible to or affected by a specific occupational disease, he may be permitted to waive only benefits for that occupational disease. If the statute were written in those terms and if silicosis and coal workers' pneumoconiosis were separate and distinct occupational diseases, that argument might have some validity. But what the statute actually says is that if a prospective employee is found to be susceptible to or affected by a specific occupational disease, he may be permitted to waive compensation benefits for "*any aggravation of his condition* that may result from his working or continuing to work in the same" employment. (Emphasis added.) See *Va Code Ann.* § 65.1-53. This Court has held that the test to determine whether a state statute is unconstitutionally vague is whether it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385 (1925) (construing a penal statute). The only conclusion to be drawn from a plain reading of the "waiver" statute now in question is that the statute does not fit within the vagueness definition established by this Court.

E.

The Statute In Question Is Based Upon A Legitimate State Interest And Is Neither Arbitrary Nor Unreasonable On Its Face Or In Its Application.

The petitioners also complain that the state statute now under attack is based on arbitrary and unreasonable state action in its enactment and in its application to them.

Although there is little legislative history to determine the precise reasons behind the passage of this Virginia statute, the highest court of that state has emphasized that the purpose of the "waiver" statute is to provide conditional employment of those prospective employees found to be susceptible to or affected by an occupational disease and also to protect those employers who are willing to take the risk of employing such persons upon the execution of a waiver. *Jewell Ridge Coal Corp.* v. *Vance*, 203 Va. 57, 125 S.E.2d 879 (1962). In the absence of such a statute, the only alternative left to employers such as Clinchfield Coal Co. and Jewell Ridge Coal Corp. is to refuse employment to such persons rather than to risk a certain claim for workmen's compensation benefits at a later date. It is quite obvious that the benefit of having such statute is as great or greater to prospective employees such as the petitioners as to the employers. There can be no question that this statutory classification does bear a rational relationship to a legitimate state purpose and, as such, meets the requirements of the U.S. Constitution. *See Morey* v. *Doud*, 354 U.S. 457 (1957).

Another apparent basis for the petitioners' claim is that the statute creates the possibility of abuse in its application. However, it has been made clear that courts cannot assume a possible abuse of power as a reason for denying that

power. As the Court said in *Bailey* v. *Patterson*, 182 F.2d 46 (D.C. Cir. 1949); aff'd. 341 U.S. 1918 (1951):

> "Almost every power, constitutional, statutory, regulatory, contractual or whatnot, is susceptible of abuse. . . . Abuse of power is, of course, forbidden, but the mere potentiality of abuse does not constitute invalidity of power. We cannot declare an act unconstitutional merely because under it there is a possibility of abuse."

182 F.2d at 162. In the instant case, the petitioners have not only failed to show an abuse of power by the enactment and enforcement of *Va. Code Ann.* § 65.1-53 but also any potentiality for such an abuse.

CONCLUSION

For the foregoing reasons, Clinchfield Coal Company and Jewell Ridge Coal Corporation respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CLINCHFIELD COAL COMPANY

By: J. THOMAS FOWLKES

JAMES P. JONES
208 East Main Street
Abingdon, Virginia 24210

Of Counsel for Respondents

CERTIFICATE OF SERVICE

In accordance with Rule 33(1), Supreme Court of the United States Revised Rules, I hereby certify that I am a member of the bar of this Court; that I have filed forty copies of the foregoing Brief with the Office of the Clerk of the Supreme Court of the United States, Supreme Court Building, Washington, D.C. 20543; and that I have served this Brief upon petitioners by depositing three (3) copies of the same in a United States Post Office with first class postage prepaid, and addressed to S. Strother Smith, III, Esq., Attorney at Law, 188 East Main Street, Abingdon, Virginia 24210, petitioners' counsel of record, on or before the day this Brief was filed. I further certify that all persons required to be served have been served.

JAMES P. JONES
Of Counsel